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No. 03-1500

IN THE

Supreme Court of the United States

Thomas Van Orden,
Petitioner,

v.

Rick Perry, in his Official Capacity as Governor of Texas and Chairman, State Preservation Board, et al.,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF FREEDOM FROM RELIGION FOUNDATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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INTEREST OF AMICUS CURIAE

The Freedom From Religion Foundation, Inc. (the "FFRF") is a non-profit educational group whose two primary purposes are to promote the constitutional principle of separation of state and church and to educate the public on matters relating to nontheism.[1] The FFRF was incorporated in Wisconsin in 1978, and it now has more than 5,000 members, who generally describe themselves as "freethinkers," a label intended to include atheists, agnostics and rational skeptics of any pedigree.

The FFRF's activities include a variety of educational programs and, when necessary, litigation. The FFRF's educational activities include publishing the monthly newspaper, *Freethought Today*, sponsoring high school and college essay competitions, conducting conventions, issuing awards, and publishing a wide array of books, pamphlets, and other printed materials. The FFRF also has established a book collection at the Memorial Library at the University of Wisconsin—Madison, and it maintains its own substantial library of literature on freethought and religion at its offices in

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[1] The parties to this appeal have consented to the FFRF's filing of this brief amicus curiae. The Petitioner's blanket consent to the filing of briefs amicus curiae is on file with the Court, and the Respondent's written consent to the FFRF's filing is submitted with this Brief. Pursuant to Supreme Court Rule 37.6, the FFRF states that no counsel for any party authored this brief in whole or in part and that no party or entity other than the FFRF, its affiliates, or counsel made a monetary contribution to the preparation or submission of this brief.

Madison. More information about the FFRF and its programs is available at its web site, www.ffrf.org.

The FFRF has been an active litigant on behalf of its members and other citizens concerned with governmental involvement with religion, and it has filed twenty-three suits alleging First Amendment violations since its inception. Although the FFRF is committed to nontheism and religious skepticism, it has on occasion worked with religious groups who share the FFRF's objections to the governmental endorsement of religion. In fact, many of the co-plaintiffs in suits filed by the FFRF are themselves religious individuals who also are committed to the principle that government must remain rigorously neutral in religious matters.

The FFRF's legal successes include: preventing the State of Wisconsin from declaring Good Friday a legal holiday, *Freedom From Religion Found. v. Litscher*, 920 F. Supp. 969 (W.D. Wis. 1996); barring direct taxpayer subsidy of religious schools, *Freedom From Religion Found., Inc. v. Bugher*, 249 F.3d 606 (7th Cir. 2001); terminating the funding of faith-based substance abuse treatment programs, *Freedom From Religion Found. v. McCallum*, 179 F. Supp. 2d 950 (W.D. Wis. 2002); and ending a long-term practice of illegal Bible instruction in public schools, *Doe v. Porter*, 370 F.3d 558 (6th Cir. 2004).

The FFRF has a particular interest in this case. The FFRF first challenged the display of a Fraternal Order of Eagles Ten Commandments monument in 1985. *See Freedom From Religion Foundation, Inc. v. Zielke*, 663 F. Supp. 606 (W.D. Wis. 1987), *aff'd*, 845 F.2d 1463 (7th Cir. 1988).

Since the Seventh Circuit's decision in *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), the FFRF has again devoted significant effort to challenging the display on government property of the Ten Commandments monuments donated by the Eagles. After requests from the FFRF, the Wisconsin cities of Milwaukee and Monroe removed The Eagles' Ten Commandments monuments from public property. The City of La Crosse, Wisconsin, however, has refused to remove a Ten Commandments monument from a city park and, instead, it attempted to sell a sliver of land under the monument to the Eagles. The FFRF sued the city on behalf of twenty-two area residents, including both the religious and the non-religious, alleging that the display of the monument and the attempted sale of the land violated the Establishment Clause of the First Amendment. Judge Barbara B. Crabb's cogent decisions in favor of the plaintiffs, including the FFRF, contain a model analysis of the constitutional problem of governmental endorsement of religion through the display of a religious monument. *Mercier v. City of La Crosse*, 276 F. Supp. 2d 961 (W.D. Wis. 2003); *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999 (W.D. Wis. 2004).[2]

The FFRF has a substantial interest in the question presented to the Court in this appeal. As a result of its scholarly and educational activities, and as a result of its participation in litigation involving the Ten Commandments, the FFRF believes that its brief will present an important and unique perspective that will

[2] The second decision was necessitated by the post-judgment intervention of the Eagles as a defendant in the case.

assist the Court in resolving the Constitutional questions before it.

SUMMARY OF THE ARGUMENT

The State of Texas, like numerous other state and local governments throughout the United States, has chosen to display on public property a tablet-shaped stone monument engraved with a version of the Ten Commandments, which begins:

> the Ten Commandments
> I AM the LORD thy God
> Thou shalt have no other gods before me
> Thou shalt not make for thyself any graven images
> Thou shalt not take the Name of the Lord thy God in vain
> Remember the Sabbath day to keep it holy

The stone monument was a gift to the State from the Fraternal Order of Eagles, who made many such gifts in the 1950s and 1960s as part of its Youth Guidance Program intended to combat juvenile delinquency by providing a code of conduct for young persons. *Books*, 235 F.3d at 294. The Eagles do not shrink from the religious message of the monuments they gave. After the FFRF objected to the display of the Eagles monument in La Crosse, for example, the secretary of the local chapter of the Eagles wrote to the city that "we believe in the ideas etched in this piece of stone." *Mercier*, 305 F. Supp. 2d at 1014.

The State of Texas has participated in the Eagles' Youth Guidance Program by accepting the monument and

displaying it on the state capitol grounds. The State itself has thereby unequivocally endorsed the Ten Commandments—including those first four inherently sectarian precepts—as a proper code of conduct for Texas citizens. Judaism and Christianity thus bear the imprimatur of the State of Texas. Despite the fact that Texas citizens are legally free to worship however they choose, only Christians and Jews practice a faith that has been publicly approved by the State. For this reason, the 1961 resolution of the Texas legislature accepting the monument and agreeing to display it on government property is a law respecting the establishment of religion, and it contravenes the First Amendment.

ARGUMENT

For more than three decades, this Court's Establishment Clause jurisprudence has been guided by some version of the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), although it is now *de rigueur* for federal courts at all levels to express misgivings about its continued vitality. The question of whether *Lemon* still provides the proper framework for analyzing Establishment Clause issues is not presented in this case, but it is at issue in this Court's review of *American Civil Liberties Union v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004), also involving a challenge to the display of the Ten Commandments, though not in the form of the Eagles monument at issue here.

A majority of this Court has criticized *Lemon* at one time or another, but another majority appears prepared to

embrace Justice O'Connor's endorsement analysis based on *Lemon*, which she articulated in *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring), and has refined in several cases since, notably *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 623-37 (1989) (O'Connor, J., concurring). For the purposes of this appeal, which does not involve the third prong of the *Lemon* test, the differences between the *Lemon* test and the endorsement analysis are not great. Under the endorsement test, the Establishment Clause of the First Amendment is violated by

> government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Lynch, 465 U.S. at 688. The first two prongs of the *Lemon* test, which address the government's actual intent and the objective effect of its actions, provide a useful framework for determining whether endorsement has occurred.

This is a vital interest of members of the FFRF, who are every day cast as outsiders, and often physically threatened, simply for disclaiming belief in God or expressing a commitment to the separation of Church and State. The law does not prohibit boorish behavior from private citizens, nor should it. But no one who would treat a fellow citizen with malice or disdain because of his or her religious convictions or skepticism should draw the least

encouragement from the official actions of the government. The endorsement test guards against the government's participation in this evil.

I. The State of Texas, in participating in the Eagles' Youth Guidance Program, intended to endorse religion.

The purpose prong of the *Lemon* test asks whether the challenged governmental action has a secular purpose. *Lemon*, 403 U.S. at 612. It is not enough that the government intends some attenuated secular objective. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). "[T]he proper inquiry . . . is whether the government intends to convey a message of endorsement or disapproval of religion." *Id.* at 691. If the government intends a message of religious endorsement, some secondary secular purpose will not save it. *Id.* at 690-91 (citing *Stone v. Graham*, 449 U.S. 39, 41 (1980)).

A. The Ten Commandments, especially as displayed on the Eagles monument, is inherently and predominately religious.

Whether the government's display of a religious symbol communicates a message of endorsement depends heavily on the context of the display. *Allegheny*, 492 U.S. at 595-97. Nevertheless, the nature of the religious symbol itself is crucial to the government's message. *See, e.g., id.* at 582-86 (explicating the meaning of the menorah). Thus, the analysis of Texas' purpose in displaying the Ten Commandments properly begins with an examination of the Eagles monument itself.

The primary feature of the monument, of course, is the text of one version of the Ten Commandments. As this Court has recognized, the Ten Commandments is inescapably a religious text:

> The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

Stone, 449 U.S. at 41-42 (footnotes and citations to the Bible omitted). The design of the Eagles monument enhances the religious nature of its main text by including the Jewish Star of David symbol and the Christian Chi Rho symbol. *Books*, 235 F.3d at 302. "It cannot be doubted, therefore, that this monument bearing the Ten Commandments possesses a religious nature." *Id.*

The Ten Commandments cannot now be made secular by showing that they have had an influence on United States law. The Brief of Amicus Curiae Liberty Counsel filed in the appeal to the Fifth Circuit in this case cites numerous examples of state and colonial laws codifying each of the Ten Commandments at the time of the framing and before. *Van Orden v. Perry*, 351

F.3d 173 (5th Cir. 2003) (No. 02-51184). These state and colonial laws are, of course, largely irrelevant to our understanding of the intent of the framers because they pre-date the Fourteenth Amendment which brought state government within the ambit of the First Amendment. As for early pronouncements from the federal government encouraging obedience to the Ten Commandments, this Court has made clear that our nation's "heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause." *Allegheny*, 492 U.S. at 604-05. Ultimately, these examples simply prove too much: in the early days of the Republic, overtly religious precepts were enshrined in the law of the States, and draconian penalties were imposed for violating them. These religious precepts cannot today be deemed secular and endorsed by government simply because they were at one time enacted in law.

B. The commemoration of the Eagles' Youth Guidance Program is not a genuinely secular purpose.

The State of Texas contended that its purpose in accepting the Eagles monument and displaying it on government property was to "congratulate" the Eagles "for their efforts and contributions in combating juvenile delinquency throughout our nation." Brief of Appellees at 6, *Van Orden* (No. 02-51184). The legislative history relating to the acceptance of the monument is apparently quite thin, containing no record of any discussion about the monument or the reasons for its acceptance. *Van Orden*, 351 F.3d at 176. The congratulatory statement is apparently

the only contemporary expression of the legislative purpose of the display. *Id.*

The circuits are divided about the degree to which the government's stated purpose for a religious display is entitled to deference. In light of the inherently religious nature of the Eagles monument, the Seventh Circuit imposed on the government the burden of proving that it has taken steps to "obviate its religious purpose." *Books*, 235 F.3d at 303 n. 8 (citation omitted); *see also Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 771 (7th Cir. 2001). The Fifth Circuit, on the other hand, more readily deferred to the government, concluding that "[w]e are not persuaded that the Resolution of the Texas Legislature in 1961 was a sham." *Van Orden*, 351 F.3d at 178-80. The Fifth Circuit, unlike the Seventh, will apparently accept a government's recited secular purpose unless it is affirmatively shown to be an intentional fraud.

The Fifth Circuit's deference to the Texas legislature does not square with this Court's conclusion in *Stone* that "no legislative recitation of a supposed secular purpose can blind us" to the sacred nature of the Ten Commandments. 449 U.S. at 41. This Court should reject the State's alleged purpose in passing the 1961 resolution, not because it was an intended fraud, but because the State's purpose of congratulating the Eagles' accomplishments is not legitimately secular.

"Congratulating" is among a category of purposes whose secularity cannot be evaluated in the abstract. Congratulate means "to express sympathetic pleasure to

on account of success or good fortune."[3] Other such purposes that cannot be evaluated in the abstract include "honoring," "commemorating" and "memorializing." These purposes might be usefully labeled "transitive purposes," because they require an object to complete their meaning. Such a transitive purpose is not secular unless both the means of accomplishing it and its object are secular.

To illustrate the requirement that the means of serving these purposes be secular, consider the purpose of "beautification." It is without doubt a legitimate secular government objective to beautify the landscape of a public park. But "beautification" is not a legitimate secular purpose if beautification is achieved by means of the erection and display of a religious monument in a city park. *See, e.g. Gonzales v. North Township*, 4 F.3d 1412, 1421 (7th Cir. 1993). The purpose offered by the government to justify the use of religious iconography must explain not just the desire to erect some type of beautifying display, it must explain the reasons for the specifically religious character of the display. If the purportedly secular purpose does not explain the religious character of the display, but only explains the impulse to beautify, the purpose prong of the *Lemon* test has not been satisfied because the government has effectively offered *no* reason for a specifically religious display, regardless of the sincerity of the government's interest in beauty.

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[3] Webster's Third New International Dictionary Unabridged 478 (1981).

Mercier provides an example of an appropriate secular object, but one commemorated through improperly religious means. The City of La Crosse contended that the Eagles monument in a city park was intended to commemorate the efforts of young people in helping to fight a flood. The district court, the Honorable Barbara B. Crabb presiding, rejected this purpose as not truly secular:

> Defendant makes a half-hearted attempt to demonstrate a secular purpose by pointing to the fact that the monument was dedicated to those who participated in efforts to protect the city from the 1965 flood, but this argument is not persuasive. First, it is difficult to see how dedicating a monument to a particular group can diminish its religious nature. A Bible is no less holy because the blank line following the phrase "Presented To" in the front cover is filled with the name of a non-believer instead of a Christian minister. Building a church in memory of a beloved parishioner does not make it any less a place of worship. Similarly, using the monument to recognize the achievements of the city's youth does not alter the religious message that the monument conveys.

Mercier, 276 F. Supp. 2d at 973-74. The principle here is a simple one: the content of a religious display must substantially relate to the legitimate secular object that the legislature intended to commemorate. There would have been nothing improper about commemorating the public service of the city's youth, but to do so by means of the display of a religious code of conduct—which bore utterly

no relation to the events commemorated—unquestionably communicated the city's endorsement of that code.[4]

The object of the transitive purposes of congratulation, commemoration or honor must also be secular, because inherent in these concepts is the expression of approval. Therefore, a legislature is not serving a secular purpose when it is offering congratulations for, commemorating or honoring events or achievements that are themselves predominately religious.

In the Texas case, neither the object nor the means of congratulation were secular. As for the means, the Texas legislature's interest in commemorating the civic contributions of the Eagles would have been properly achieved by a monument *to* the Eagles, one that expressly recited and acknowledged those civic contributions. But the monument erected on the Texas Capitol grounds does not do so. The State's purported desire to commemorate the Eagles does not explain why the State would display the text of the Ten Commandments instead of a plaque saying "congratulations and thank you" to the Eagles.

The object of the Texas legislature's congratulation is even more dominated by religion. The Eagles' "efforts and contributions in combating juvenile delinquency throughout our nation" consisted of the Youth Guidance Program, which was simply a program to arrange for the

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[4] Moreover, in La Crosse, the city's alleged purpose was demonstrably a sham: the city had voted to accept and display the monument in 1964, well before the flood had occurred. *Mercier*, 276 F. Supp. 2d at 974.

display of the Ten Commandments on public property. Even if the Fraternal Order of Eagles is not a religious institution, the stated purpose of its Youth Guidance Program is, undeniably and predominately, religious: to expose youths to the Ten Commandments as a common code of conduct and to encourage citizens to contemplate and embrace its precepts. *Books*, 235 F.3d at 294.

Ultimately, the State of Texas has commemorated and honored the Eagles Youth Guidance Program by directly participating in it. The State has thus not merely endorsed the religious message of the Eagles monument, it has affirmatively aided the Eagles in its efforts to secure adherence to the religious precepts so plainly expressed on it.[5]

This Court should reverse the holding of the Fifth Circuit that the State of Texas had a valid secular purpose for the display of the Ten Commandments on the capitol grounds. In doing so, this Court should make clear that a transitive purpose, such as congratulation, commemoration, or honor, is not a valid secular purpose unless both the object and the means of accomplishing it are themselves secular. To put it simply,

[5] The State's second purported secular purpose, advancing the morality of youth, is even more transparently religious. Brief of Appellees at 20, *Van Orden* (No. 02-51184). There is nothing wrong with the State's advancement of youth morality, so long as this objective is accomplished through secular means. But the State cannot pretend that this is a legitimate secular purpose for the display of an inherently religious text. If it were, government would simply have a legitimate secular purpose for endorsing religious devotion in certain specified faiths.

the commemoration of a predominately religious event, or the commemoration of any event through predominately religious means, is an endorsement of religion.

II. The display of the Eagles monument on the grounds of the Texas State Capitol communicates the State's endorsement of religion.

Even if the Texas legislature did not actually intend to communicate its endorsement of religion, its display of the Eagles monument on the grounds of the state capitol runs afoul of the First Amendment because it communicates the endorsement of religion to a reasonable viewer. *See Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (analyzing the purpose prong of the *Lemon* test); *see also Freedom From Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000). The hypothetical reasonable viewer is one who is "aware of the history and context of the community and forum in which the religious display appears." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995). But in this case, the viewer would understand the message of endorsement even if the viewer knew nothing about the Eagles' Youth Guidance Program.

There are, obviously, certain contexts in which a government may display even highly religious texts or images without communicating endorsement. This Court has identified two, a proper school curriculum and a typical museum. In *Stone*, the Court explained that the Ten Commandments can be presented by a government as playing a role in our civic life, such as when it is "integrated into the school curriculum . . . in an

appropriate study of history, civilization, ethics, comparative religion, or the like," 449 U.S. at 42 (citing *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963)). In *Lynch*, Justice O'Connor explained that "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch*, 465 U.S. at 692, *cited with approval in Allegheny*, 492 U.S. at 595.

The Fifth Circuit concluded that the grounds of the Texas state capitol provided a context that negated, or at least sufficiently reduced, the religious content of the Ten Commandments. But the Fifth Circuit did not properly consider two crucial factors that account for the message of endorsement conveyed by the display of the Ten Commandments by the State of Texas: the difference between the institutional mission of the Capitol grounds and the mission of a museum; and the difference between the effect of a religious text and religious symbols.

A. Unlike the display of a religious artifact in a museum, the display of a permanent monument to a religious text on the grounds of a government building inevitably communicates endorsement of religion.

The Fifth Circuit concluded that the display of the Ten Commandments on the Capitol grounds did not communicate endorsement of religion because it determined that the capitol grounds are, in significant ways, like a museum. The court quoted the "typical museum" example as used by Justice Blackmun in

Allegheny, and then reviewed the facts cited by the State of Texas in support of the museum analogy: the grounds contain seventeen monuments; and, the grounds are overseen by the Texas State Preservation Board, which qualifies as a museum under federal law, employs three professional curators, and maintains an art collection with a value of twenty to thirty million dollars. *Van Orden*, 351 F.3d at 180-81. The reasoning on this point is somewhat obscure, but ultimately the court deferred to the view of the Preservation Board staff that, because of the location of the Eagles monument, its display communicated only a secular message concerning the Ten Commandments' contribution to the law. *Id.* at 181.

The Fifth Circuit has missed the reasons why a typical museum setting does not convey a message of endorsement of the religious content of the art displayed in it. First, the institutional purpose of a museum is collection, preservation, and education.[6] One does not expect to find in a museum only those artifacts whose content the museum endorses. Because the reasonably informed viewer understands the mission of the museum, its display of an artifact is an implicit statement that the artifact is historically important or interesting, but not that its content is endorsed by the museum. The second reason the display of an artifact in a museum does not convey

[6] "Museums make their unique contribution to the public by collecting, preserving, and interpreting the things of this world.... Their missions include collecting and preserving, as well as exhibiting and educating with materials not only owned but also borrowed and fabricated for these ends." American Association of Museums, *Code of Ethics for Museums* (last visited Dec. 9, 2004).

endorsement is that typically a museum contains many artifacts whose diverse content cannot be consistently endorsed. A single museum may, for example, display both devoutly Christian art of the middle ages and Renaissance, and anti-religious art of the Soviet Union. The display of the Soviet art does not in any way "secularize" the Christian art, but a reasonable viewer would not understand the museum to be communicating endorsement of either Christianity or Marxism.

The grounds of the Texas State Capitol are simply not like the typical museum in either its mission or the diversity of the artifacts displayed there:

> [T]he grounds are designated as a National Historic Landmark that is dedicated to the display of "statues, memorials, and commemorations of people, ideals and events that compose Texan identity; these displays document the struggles and the successes that Texans have experienced in the past and serve to inspire us as we face the challenges of today."

Van Orden, 351 F.3d at 180 (quoting H. Con. Res. 38, 2001 Leg., 77th Reg. Sess. (Texas 2001)). The grounds contain seventeen monuments, and visitors will properly understand that each one of them communicates the state's endorsement of the subject that is depicted, memorialized, or commemorated.[7] Some form of endorsement is simply

[7] The seventeen monuments are described and depicted in the State Preservation Board, *Online Gallery: Monument Guide*, at http://www.tspb.state.tx.us/spb/gallery/MonuList/MonuList.htm (last visited Dec. 9, 2004).

inherent in the concept of "monument," and the grounds of the Texas State Capitol is a field of monuments, not a museum.

The hallmark of the typical museum and the proper school curriculum, the quality that neutralizes the message of endorsement that might otherwise attend the display of a religious artifact, is scholarly integrity and independence.[8] A public museum may display religious art, so long as it is selected on the basis of its quality and importance, and not on the basis of its religious message. Students in a public school may be asked to explore the meaning and cultural significance of the Ten Commandments along with other secular and religious codes without running afoul of the First Amendment, so long as they remain free to accept or reject those religious tenets according to the dictates of their own consciences

[8] This ideal is reflected, for example, in The American Association of Museums *Code of Ethics for Museums*, which requires the museum to ensure that its programs "are founded on scholarship and marked by intellectual integrity" and "respect pluralistic values, traditions, and concerns." *AAM Code of Ethics for Museums*, supra note 6. Similarly, the International Council of Museums Code of Ethics for Museums provides that "[t]he museum should seek to ensure that the information it publishes, by whatever means, is accurate, honest, objective and well-founded academically." *ICOM Code of Ethics for Museums*, available at http://icom.museum/ethics_rev_engl.html#2 (last visited Dec. 9, 2004).

without having it affect their standing in the community. The grounds of the Texas State Capitol plainly lack this scholarly detachment: the legislature intended the field of monuments to identify the "people, ideals and events that compose Texan identity." Because one of those monuments endorses the specifically religious tenets of the Judeo-Christian tradition, the Texas legislature has made one's standing as a Texan depend on one's adherence to the Ten Commandments.

In reversing the Fifth Circuit on this point, the Court should make clear that the only contexts in which predominately religious texts or symbols may be displayed are those characterized by rigorous scholarly integrity and independence.

B. Outside a scholarly context, a monument bearing a religious text conveys endorsement of the text's religious tenets.

The Fifth Circuit, like other courts and commentators, finds a precedent for the display of the Eagles monument in the depictions of Moses at the Supreme Court building:

> A display of Moses with the Ten Commandments such as the one located in the United States Supreme Court building makes a plain statement about the decalogue's divine origin. Yet in context even that message does not drown its secular message. So it is here.

Van Orden, 351 F.3d at 182. The Fifth Circuit has overlooked a crucial distinction between the representations of Moses in the Supreme Court building and the Eagles monument at the Texas Capitol. The Eagles monument bears the entire text of a version of the Ten Commandments, whereas the text of the Ten Commandments is not displayed at the Supreme Court.

The distinction is crucial, and it largely explains the difference in the result in *Stone* and that in *Lynch* and *Allegheny*. The display of the full text of the Ten Commandments outside of a scholarly context entails promotion of its inherently religious aspects, which are utterly inescapable in the first four Commandments. Given this unequivocal religious content, displays of the text of the Ten Commandments are properly decided under *Stone*. But religious imagery and symbols are more ambivalent, and often do not unequivocally communicate solely religious doctrine. Displays of religious imagery and symbols therefore require the more extended endorsement analysis set out in *Lynch* and *Allegheny*.

Under *Lynch* and *Allegheny*, the depictions of Moses at the Supreme Court do not communicate religious endorsement. Moses is presented there as an example of a historical law-giver, a commemoration of the evolution of a law-governed society. As the Supreme Court's *The East Pediment Information Sheet*[9] explains:

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[9] Supreme Court information sheets on each of the pediments and friezes are available at http://www.supremecourtus.gov/about/archdetails.html.

> Law as an element of civilization was normally and naturally derived or inherited in this country from former civilizations. The "Eastern Pediment" of the Supreme Court Building suggests therefore the treatment of such fundamental laws and precepts as are derived from the East. Moses, Confucius and Solon are chosen as representing three great civilizations and form the central group of this Pediment. Flanking this central group—left —is the symbolical figure bearing the means of enforcing the law.

Moses is also depicted among the "procession of 'great lawgivers of history,'" which portray the development of the law in the North and South Courtroom friezes. The friezes portray eight allegorical figures and eighteen historical lawgivers, which include the religious figures of Moses and Muhammad, as well as the secular figures of William Blackstone, John Marshall and Napoleon. Muhammad is depicted with the Qur'an, and "Moses is depicted in the frieze holding two overlapping tablets, written in Hebrew. Commandments six through ten are partially visible." *Courtroom Friezes: North and South Walls Information Sheet*.

The East Pediment and the Courtroom friezes focus on the historical lawgivers; the bronze doors on the front portico depict "significant events in the evolution of justice in the Western tradition." *The Bronze Doors Information Sheet*. These significant events allude to, without actually displaying, specific legal codes, including the Justinian Code, the Magna Carta, The Westminster Statute and the Court's decision in *Marbury v. Madison*.

Each of these lawgivers and events is commemorated, even celebrated, at the Supreme Court. But even though some of the lawgivers are religious figures, each is celebrated for his contribution to the development of the law, not for his contribution to religion. *Allegheny*, 492 U.S. at 651 (Stevens, J., concurring in part and dissenting in part) (concluding that the Courtroom friezes "signal[] respect not for great proselytizers but for great lawgivers"). Crucially, the literal texts of the laws of the many historical lawgivers is nowhere presented in the commemorative artwork at the Court. And for that reason, no reasonable viewer would understand the commemorative artwork at the Supreme Court to convey a message of endorsement of the specific precepts set down by all the diverse lawgivers from Hammurabi to Napoleon.

There is no question, however, that the Supreme Court building conveys the unequivocal endorsement of the texts inscribed on the pediments, "Justice the Guardian of Liberty" and "Equal Justice Under Law." Depictions of historical figures and religious symbols are open to multiple interpretations, but the presentation of a literal text as part of a monument typically conveys endorsement.

In contrast to the depictions of Moses at the Supreme Court, the display of the Eagles monument, dominated by the literal text of the Ten Commandments, inevitably communicates the endorsement of the specific precepts of the Commandments. These specific precepts are inherently religious, and they cannot be legitimately presented by a government, unless it is in a context that

negates the message of endorsement. The grounds of the Texas State Capitol does nothing to negate that message.

III. The display of the Ten Commandments is not an acceptable recognition of the sensibility of the religious majority.

The Fifth Circuit framed its Establishment Clause analysis as a kind of balancing test, in which it had an affirmative obligation to recognize "the pervasive presence of strongly held views about religion with myriad faiths and doctrines." *Van Orden*, 351 F.3d at 178. The court made clear, however, that the "strongly held views" it sought to recognize were those of religious adherents, not religious skeptics: "Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God." *Id.*, quoting *Abington School Dist. v. Schempp*, 374 U.S. at 206 (Goldberg, J., concurring).

Thomas Jefferson's "wall of separation between church and state" remains, at the very least, a guiding metaphor for this Court's Establishment Clause jurisprudence. *Everson v. Board of Education*, 330 U.S. 1 (1947) (adopting Jefferson's view); *Lynch*, 465 U.S. at 673 (suggesting the "wall of separation" is a useful, but not entirely accurate, figure of speech). Nevertheless, this Court has declined to "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens." *Allegheny* at 623 (O'Connor, J., concurring). To this point, however, acceptable instances of official governmental recognition of religious beliefs and customs have been restricted to instances of "ceremonial

deism" with minimal religious content. But these are not simply some long-standing instances of endorsement that the Court will overlook; they do not, at least in Justice O'Connor's view, entail endorsement of specific religious beliefs at all.[10] But under the Fifth Circuit's decision in *Van Orden*, acceptable government recognition of religion is indistinguishable from the State's endorsement of the core precepts of the religious majority.

Justice O'Connor's concurrence in *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2321-27, *reh'g denied*, 125 S. Ct. (2004), provides a succinct inventory of four factors that indicate whether a religious reference is an acceptable governmental acknowledgment of the religious traditions of our nation. This inventory demonstrates that the display of the Eagles monument at the Texas State Capitol is plainly an endorsement of religion.

The first factor is the history and ubiquity of the religious practice. *Id.* at 2323. Although one does not acquire a vested interest in a constitutional violation, the ubiquity of a religious reference, particularly one that passes without objection, tends to indicate that the

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[10] Justice O'Connor's analysis of ceremonial deism provides a useful framework to demonstrate that the display of the Eagles monument at the Texas State Capitol communicates endorsement of religion. As an organization of religious skeptics, however, the FFRF believes that most instances of ceremonial deism, such as the incorporation of the motto "In God We Trust" on United State currency, communicate governmental endorsement of belief in a single supreme being.

religious reference serves a secular purpose. Although the display of the Eagles monuments has endured in some locations for more than forty years, it can hardly be said the governmental display of the Eagles monuments is as long-standing as the invocation delivered at the opening of Congress. *See Marsh v. Chambers*, 463 U.S. 783 (1983). And, although the Eagles monument at the Texas Capitol may not have prompted litigation before Mr. Van Orden's suit, it did not pass without objection: the FFRF and its Texas members had written to the State requesting its removal for years. And in many locations around the country the display of the Ten Commandments has been contested in court, often successfully, for decades. There is no unbroken tradition of display of the Ten Commandments in the United States; its display continues to generate intense controversy and division whenever it appears on government property.

The second factor is whether the religious reference actually involves worship or prayer:

> Any statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate secular purpose of solemnizing an event and recognizing a shared religious history.

Elk Grove, 124 S. Ct. at 2324 (citing *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 309 (2000)). The Ten Commandments are unambiguous on this point: they literally command the reader to worship one God, and they prescribe the means of doing so.

The third factor is the absence of reference to a particular religion. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Elk Grove*, 124 S. Ct. at 2325 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). The display of the text of the Ten Commandments on the Eagles monument obviously breaches this prescription. In the first place, the Ten Commandments is a text sacred to Judaism and Christianity— but not to all religions. And the Eagles monument reinforces this exclusivity by incorporating the Jewish Star of David and the Christian Chi Rho symbol, without symbols of any other religion.

The Eagles monument is even more profoundly sectarian than is apparent from the analysis of its text and iconography. It is commonly repeated that the monument displays a "non-sectarian" amalgamation of Jewish, Protestant and Catholic versions of the Commandments. *See, e.g., Books*, 235 F.3d at 294. But, in fact, the Eagles monuments installed around the country contain textual variations presumably tailored to suit the religious majorities of the communities in which they are displayed. The Eagles monument displayed at the Texas Capitol is the more common "Protestant" version.[11] A "Catholic" version, deleting the second commandment prohibiting the making of graven images and splitting the tenth into two prohibitions of coveting, is displayed at the Colorado

[11] To cite just a few additional examples, the Protestant version was also displayed in: Hanover and Winter Park, Pennsylvania; Grand Junction, Colorado; Manhattan, Kansas; Jefferson City, Missouri; and Frederick, Maryland.

State Capital; in South Bend, Indiana; and formerly in Milwaukee, Wisconsin; and Duluth, Minnesota.[12]

The fourth factor is whether the specifically religious content of the reference is limited. *Elk Grove*, 124 S. Ct. at 2326. In the case of the Pledge of Allegiance, only two of its thirty-one words were religious. But the first four of the Ten Commandments displayed on the Eagles monument in Texas are exclusively religious. The literal text of the Ten Commandments cannot be said to have only minimal religious content.

None of Justice O'Connor's factors suggests that the display of the entire text of the Ten Commandments is an acceptable governmental acknowledgement of our nation's religious heritage. The display of the Eagles monument by the State of Texas is not ceremonial deism, it is not a display of secularized religious symbols, and it is not a commemoration of our legal tradition or heritage. It is, pure and simple, the endorsement of an inherently sectarian text, in a manner calculated to encourage adherence to its precepts. The fact that this display occurs on the grounds of the Texas State Capitol where it is surrounded by other monuments does not neutralize its sectarian purpose; it enhances it. The Texas legislature has used the capitol grounds and the monuments on it to express its view of what it means to be a Texan. By making the Ten Commandments a part of that identity, Texas has

[12] A photograph of the Catholic version displayed in Duluth is available on the web site of the Minneapolis-St. Paul Star Tribune, at http://www.startribune.com/stonline/images/news51/1dulu0308.1.jpg (last visited Dec. 9, 2004).

made one's religious beliefs relevant to one's standing as a citizen, thus violating the central tenet of the Establishment Clause.

CONCLUSION

There is no shortage of opportunities to display the Ten Commandments on private property. In La Crosse, when the city's display of the Eagles monument was challenged by the FFRF, local churches and the La Crosse chapter of the Eagles offered to publicly display the monument on private property. The common council of the City of La Crosse stood firm in the political battle that followed, passing a resolution declaring that the monument "deserves to remain in its present location by any and all means available to the City." *Mercier*, 276 F. Supp. 2d at 964.

The Eagles monuments in La Crosse and Texas, like those throughout the United State, were erected for the predominately religious purpose of securing adherence to particular religious faiths. The Eagles enlisted the assistance of local governments in advancing its Youth Guidance Program, and those local governments shared the Eagles' objectives when they accepted those monuments and agreed to display them. The purportedly secular purposes now offered to explain the display of these monuments cannot disguise the fact that the governments who have displayed them have done so for unconstitutional religious reasons. The Constitution requires that these monuments be removed. No citizen should be made to feel like a outsider in her own community simply because she does not share the religious view of the majority.

The first commandment alone, "Thou shalt have no other gods before me" reveals why it is unconstitutional for the government to display the Ten Commandments. Under the guarantees of the Establishment Clause of the First Amendment, our citizens may have any gods they like, as many gods as they like, or none at all.

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